84-427

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JANET A. MOORE,

Petitioner,

v.

GEORGE P. SHULTZ, Secretary of State
DR. GLEN MATHIAS, Chief of
Domestic Medical Unit, Department of State, and
PAUL CORON, Attorney, Department of State,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLIFFORD J. HYNNING
(Counsel of Record)
2121 Massachusetts Ave. N.W.
Washington, D.C., 20008
(202) 387-7783

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

The central issue for Petitioner Moore is her failure in more than three years of litigation to find a court or administration tribunal able and willing to exercise jurisdiction over the gravamen of her due-process claim as a federal career employee against being officially branded as "unfit-for-duty" (psychiatric) by the Department of State without authorization under any Federal statute or Executive regulation. (I) Moore started in the United States District Court for the District of Columbia, which on April 30, 1981, dismissed her complaint, before pending discovery could start, for failure to exhaust the administrative remedies of the Merit Systems Protection Board. (II) Moore promptly filed an appeal to the Board, largely based on her due-process complaint; after two years, in 1983, the Board dismissed Moore's appeal and officially stated that it lacked jurisdiction over the unfitness finding as well as any allegation of "a violation of constitutional rights standing alone." (III) This brought Moore back to the United States Court of Appeals for the District of Columbia Circuit, where Moore's appeal from the district court had been stayed pending the final order of the Board, as reported in (II) above. (IV) In 1984 the appellate court denied Moore's appeal in an unreported judgment that affirmed the judgment of the District Court "generally for the reasons stated in its Order filed April 30, 1981." Against this background, the questions presented are as follows:

1. Did the branding of Moore as "unfit for duty" (psychiatric) by the Department of State in its official records without authorization under any Federal statute or Executive regulation, with "unfit for duty" still unexpunged, with continuing personal and economic consequences to date, constitute a complaint of constitutional dimensions?

2. Whether the dismissal by a district court of a due-process complaint on the specific predicate that Moore had not exhausted her administrative remedies before the Merit Systems Protection Board is clearly erroneous where the predicate of the Board's jurisdiction over the substance of Moore's complaint collapses by virtue of the Board's official finding that it lacks jurisdiction?

3. Whether the "Memo of understanding" signed by Moore on February 4, 1980 (*infra*, p. 4) relating to a psychiatric examination was an effective waiver of Moore's constitutional rights under the decisions of this Court requiring that a waiver "not only must be voluntary, but must be knowing, intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences"?

4. If the sole authorization for the conduct of a psychiatric examination by the Department of State is the OPM regulations in the Federal Personnel Manual, are the provisions of those regulations binding on the Department of State so that substantial departures from the procedural provisions of the regulations invalidate the Departmental actions?

5. In handling a due-process complaint by a federal employee for an injury "not attributable to personnel actions which may be remedied under the federal statutory scheme," has a United States District Court, in the absence of a contrary Congressional directive, a duty to "make the kind of remedial determination that is appropriate for a common-law tribunal"?

6. Whether the District Court's abrupt cutoff of discovery on the reckless or callous indifference of responsibility to Moore's federally protected rights was erroneous with respect to the allegation?

7. Whether the dismissal of the complaint against respondents Mathias and Coran, who were specifically sued in their public officer capacities, is in conflict with recent case law on the rights of litigants against governmental officers for actions reflecting a reckless and callous indifference to federally protected rights?

PARTIES

The caption of this Petition contains the names of all the parties to this action in the District of Columbia, except that Secretary Schultz was substituted for former Secretary of State Haig, whose name appeared on the complaint and District Court order. The substitution was presented by attorneys for the Department of Justice. In the case of Paul Coron, the last name should have been spelled with an "a" instead of the second "o", for which counsel apologizes. It is, however, clear "Coran" was meant, instead of "Coron."

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Janet A. Moore respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

1. Letter to counsel, dated December 24, 1980, from Horace F. Shamwell, Deputy Assistant Legal Adviser for Management, Department of State, branding Moore as unfit for duty in the Department of State, printed pp. 1a-1b.

2. *Moore* v. *Haig, et al.*, U.S. District Court, D.C., No. 81-0534 April 30, 1981, dismissed Moore's due-

process complaint for failure to exhaust administrative remedies before the Board, is unreported., printed at pp. 3a-6a.

3. *Moore* v. *Department of State*. June 16, 1983, the Merit Systems Protection Board dismissed Moore's appeal on the ground that the Board had no jurisdiction, printed in the Appendix, pp. 7a-10a.

4. *Moore* v. *Shultz, et al.*, U.S. Court of Appeals for the D.C. Circuit, No. 81-1743, dismissed Moore's appeal and affirmed the judgment of the district court, is unreported, and printed here at pp. 11a-14a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 18, 1984. A timely petition and suggestion for rehearing *en banc* were denied by order on June 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND ADMINISTRATIVE REGULATIONS INVOLVED

This case involves:

1. Article 5 of the Amendments to the Constitution of the United States, reading, in part, as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

2. Excerpts from Office of Personnel Management, Federal Personnel Manual, FPM Supplement 831-1, "S10-10," printed at pp. 15a-19a.

STATEMENT OF THE CASE

This petition comes here from the appellate affirmance (in an unpublished judgment) of the District Court dis-

missal of a due-process complaint by a federal employee on a very limited record in the trial court below. No testimony was introduced in the trial court; no answer was filed by respondents who, on the day their answer was due, filed a motion to dismiss. Moore's pending motions for discovery were not acted upon by the trial court at the time it granted respondents' motion to dismiss.

Consequently, the trial record is limited to the following:

> (i) Moore's verified complaint, with exhibits, and accompanying motion for a TRO and authorization for discovery in advance of answer by respondents; (ii) Respondents' motion to dismiss, combined with a motion for summary judgment (with affidavits); (iii) Order of dismissal by the District Court (pp. 3a-6a); (iv) Opinion and Order of the Merit Systems Protection Board (pp. 7a-10a); and (v) Appellate affirmance of the District Court order of dismissal.

Since a motion to dismiss must admit, *arguendo*, all the allegations of the complaint—and the court order granting the motion to dismiss must do likewise—the following statement of the case is summarized from the verified complaint and attached exhibits. The District Court mentioned but did not rule on respondents' motion for summary judgment and paid no attention to the factual allegations therein, which are clearly extraneous to the proceeding in this Court.

1. Petitioner (hereinafter called Moore) was a civil service employee (tenured) of the Department of State where she had worked all her adult life, variously as a computer programer and analyst and, recently, as a computer specialist, and received throughout her service official performance ratings of "excellent" and "satisfactory" and had never been officially reprimanded. She has at no time been suspended or furloughed, reduced in grade or

pay, removed or terminated, or officially forced into early retirement.

2. During the winter 1979-80 Moore injured her ankle that required her to use a walking cast. She also complained about concededly poor air in her place of work, located immediately adjacent to the truck loading dock, from which fumes spread into the work area, and said that the polluted air had a debilitating effect on her and her coworkers. She circulated a petition of protest, which resulted in her being regarded as a trouble maker.

3. Moore's supervisors avowedly proceeded to discipline her via psychological and psychiatric examinations.

In the early part of 1980, Moore was induced to submit to a fitness-for-duty examination by personnel officer Bucsko who did not inform Moore of the procedures of the Federal Personnel Manual, "S10-10," printed at pp. 15a-19a. Nor was she informed of any obligation to submit to such an examination and was told that the Department could order the examination.

4. Moore was handed a typewritten "memo of understanding," dated February 4, 1980, which reads as follows:

MEMO OF UNDERSTANDING

> This is to certify that I am willing to voluntarily undergo a medical examination to determine by medical fitness-for-duty. The examination will consist of all portions, which may include psychiatric, deemed necessary by the Office of Medical Services to adequately determine my medical condition. I also agree to the release of pertinent medical information from my private physician(s) to the Office of Medical Services.

Moore inquired what would happen if she refused to sign the "Memo of Understanding" and was informed that she could be ordered to submit to the fitness-for-duty examination, whereupon Moore informed Bucsko that in view of a continuing problem with her ankle and effect of the bad air in the work area upon her health and her work she would agree to a medical examination.

5. Moore had no benefit of legal counsel when she signed the "Memo of Understanding"; she was told nothing of the Federal Personnel Manual on psychiatric examinations (OPM S10-10), and the due-process protections therein afforded to employees; she was given no counselling except to make it easy for the Department of State by herself applying, at age 35, for disability retirement. Moore was counselled to take sick and annual leave or leave without pay, pending further talk in the Department of State.

6. In late May or early June 1980 she reported for work at the State Department again, but after one-half day's work, she was instructed to report to the Personnel Office which told her to apply for early retirement Moore was also told to go on leave without pay. Meanwhile she was told to stay away from the Department of State. When Moore checked with the Civil Service Commission she found that early retirement was indeed an illusionary offer, inasmuch as it was subject to periodic verification and would not give her reemployment rights to any specific job in the Department of State.

7. In August, 1980, Moore retained undersigned counsel, who was surprised to find a complete absence of "adverse personnel action" sheets. Counsel promptly initiated official conversations with Fillmore Shamwell, a deputy assistant legal adviser for management in the Department of State, who supplied him with an unpub-

lished opinion of the United States District Court, D.C., entitled—*Josie W. Thomas* v. *Department of State, et al.* (1979), C.A. No. 77-0322, affd. except for pre-judgment interest in a per curiam order in No. 79-1685 (1980). That case involved a "fitness-for-duty" examination and specifically found the Department "bound by its own regulations on special examinations and disability retirement" (p. 11).

8. Moore was informed through counsel in a letter dated November 28, 1980, that the medical records would be expunged by the Department of State and that she would be restored to duty "in full satisfaction" of her claims against the Department of State, specifically waiving her claim for back pay and counsel fees. Moore rejected this offer on advice of counsel on the ground that it was not in keeping with the dignity that one would constitutionally expect of the Government of the United States to require a federal employee waive her right as a citizen to go to the courts for back pay and counsel fees.

9. On Christmas Eve, 1980, counsel received a letter from Philmore Shamwell of the Department of State (p. 1a-2a) branding Moore in terms as "unfit for duty" and stating that she cannot "be permitted to return to work, either on a full or part-time basis" unless she agreed that the Department of State "perform another fitness-for-duty examination." Counsel inquired of Shamwell whether the reference therein to "another fitness-for-duty" examination for Moore would be conducted in accordance with the Federal Personnel Manual, he received a negative reply. Counsel thereupon informed Shamwell that Moore would not submit to "another 'fitness-for-duty' " examination except in accord with the procedures of the Federal Personnel Manual, and finally inquired whether any administrative remedies remained. Shamwell replied, "None."

10. A due-process complaint and a motion for a temporary restraining order were filed in the United States District Court on March 5, 1981. The margin contains due-process excerpts from the complaint.*

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*"1. This is a civil action for a declaratory judgment and other injunctive relief to restore plaintiff to employment in the Department of State, for the award of back pay and counsel fees, and other damages, including punitive damages. This action arises under the Constitution and laws of the United States and involves a matter in controversy, exceeding the sum or value of $10,000.00, exclusive of interest and costs.

"2. Jurisdiction of this Court over the subject matter is founded upon 28 U.S.C. §§ 1331, 2201 and 2202. Jurisdiction is also based on the Fifth Amendment to the Constitution of the United States and on Articles I and III thereof.

* * *

"7. Plaintiff has been an employee of the Department of State in the competitive service for almost 8-½ years until the Department of State unceremoniously relegated her to *limbo*, wherein, at the time of the filing of this complaint, she is not permitted to work and draw pay as a result of various clearly illegal actions of the defendants, as hereinafter alleged, without being in any lawful way furloughed, suspended, removed, terminated, or retired—in a phrase, plaintiff has been turned into a "Stateless" civil cervant.

* * *

16. The plaintiff circulated a petition among her fellow workers which resulted in her being regarded by her supervisors as a "dissident" or trouble maker.

"17. The supervisors proceeded to discipline her via the psychological and psychiatric examinations that are notoriously employed in other countries, which do not abide by a constitutional rule of law, such as the Soviet Union's handling of dissidents by psychological and psychiatric techniques.

* * *

"40. Plaintiff has exhausted all the remedies available to her under applicable administrative procedures and has no adequate

11. Two days after service on March 11, 1981, on the United States Attorney, counsel received a phone call on March 13 from Ms. Whitney Adams, Asst. U.S. Attorney, offering Moore the opportunity to return to work, without taking any "fitness-for-duty' " examination—ignoring the Christmas Eve letter—and without any expunging of the "fitness-for-duty" examination (psychiatric), and without any back pay, without restoration of annual and sick leave and without payment of attorney's fees. Counsel informed Ms. Adams that he would recommend to his client that she promptly return to work, since she was under a duty to minimize damages, and rely for the rest on judicial relief. Moore returned to work on March 25, 1981.

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remedy at law other than the instant action, under the jurisdiction conferred upon this Court, for the irreparable damage she has suffered and continues to suffer as a result of the unlawful and unconstitutional acts of defendants which branded plaintiff with an unlawful finding of mental unfitness-for-duty, as herein-before alleged, which as the District Court for the D.C. Circuit said in *Josie Thomas* v. *Department of State*, C.A. Action No. 817-73, "can be disastrous to an employee's personal life and economic prospects." (p. 11) of opinion filed March 30, 1979, by Judge Barrington D. Parker.

* * *

42. The refusal to reinstate the plaintiff by defendants as aforesaid, and the repudiation of the settlement between counsel were in bad faith and with malice by defendant doctor and defendant attorney, arbitrary and capricious and in violation of the "due process" clause of the Fifth Amendment to the Constitution of the United States; and the almost year-long experience of living in the occupational limbo, in which defendants have placed her, have severely affected her emotional health and the health of her family.

43. The refusal of the defendant Secretary to reinstate plaintiff, as hereinbefore alleged, has deprived plaintiff of her employment and compensation since on or about May 1, 1980, and thereby deprived plaintiff of liberty and property without due process of law, and the resulting actions by defendant Secretary have branded her as unfit for duty, arbitrarily and capriciously.

12. Simultaneously with the offer to have Moore return to work, the Assistant U.S. Attorney filed a motion to dismiss the complaint. However, the December 24, 1980 letter, branding Moore as "unfit-for-duty" remained unexpunged after her return to work. The continued refusal of respondents to expunge the records of that "fitness-for-duty" examination constitutes a continuing violation of Moore's constitutional rights.

13. There was no discovery permitted Moore; nor was there oral argument. The District Court acted on the motion papers of Respondents, which contained a number of affidavits, to which Moore's counsel objected, and moved for the production of documents cited by the affiants. None was produced.

14. On April 30, 1981, the District Court dismissed Moore's complaint on that ground that she had "failed to exhaust her administrative remedies" before the Merit Systems Protection Board (p. 4a). Motion for reconsideration was denied on June 3, 1981 (p. 6a).

15. On June 30, 1981, Moore appealed to the Merit Systems Protection Board. After almost two years, that Board decided on June 16, 1983, that the Board lacked jurisdiction to review "the procedures employed in a fitness-for-duty examination unless the examination is related to an otherwise appealable action." Nor does the Board have jurisdiction over an allegation of "a violation of constitutional rights standing alone" (pp. 7a, at 8a).

16. Meanwhile Moore had noted an appeal to the United States Court of Appeals on June 29, 1981, and obtained a stay of the appellate process until after the Merit Systems Protection Board had issued its final opinion and order.

17. Since neither the District Court nor the referenced administrative remedy before the Board acknowl-

edged jurisdiction, counsel first submitted in No. 81-174-3 a motion for summary reversal on the ground that the predicated administrative remedy had proven itself non-existent. This step was later followed by a regular appellate brief and appendix on December 1, 1983. Very brief oral argument (15 minutes per side) led to the unanimous judgment of the panel affirming the judgment of the district court dismissing the complaint "generally for the reasons stated in its order . . ." P.11a, at p. 12a. A motion for rehearing and a suggestion for Rehearing *en banc* were denied.

REASONS FOR GRANTING THE WRIT

(a) This Case Of The Abuse Of Psychiatry As A Technique Of Disciplining Career Federal Employees In The Department Of State Is Of Exceptional National Importance To Governmental Employees Working Here Or Overseas, Not To Speak Of The Press And The Public, Who Are Wont To Think That "It Can't Happen Here."

The origins of Moore's relationships with psychiatry were prosaic enough—a sprained ankle and truck fumes spreading into her work area. She protested the air polution and started a petition of protest among her coworkers. That brought her to the attention of personnel, who decided to discipline her by talking about a "fitness-for-duty" examination and the lure of early retirement, while concealing from her the OPM regulations. Without legal counsel or the advice of relative or close friend who could grasp where the bureaucracy was moving, she agreed to sign the "Memo of understanding" as a means of getting aid for her ankle! The upshot was that Moore found herself branded as unfit for duty, away from work, and having difficulty getting back to work.

Thus was initiated a personal and occupational catastrophy for Moore, who was further induced by various

personnel and medical officers to sign a series of sick leave slips, annual leave slips, and slips for leave without pay, in consequence of the unlawful "fitness-for-duty examination"—all without advice of counsel. All was done on the ostensible basis of Moore's "consent" to what was done to her. None of these "consent" documents can stand this Court's tests for an effective waiver of constitutional rights, infra. p. 14

The entry of the District Court's order of dismissal of the complaint brought to a sudden end the evidentiary inquiry into the use of psychiatry by the Department of State, by way of noticing the depositions of respondents Mathias and Coran and their efforts to discipline via the "fitness-for-duty" examination, instead of conventional personnel techniques.

Incidentally, the posture of the government on the expunging of Moore's brand of unfitness for duty contrast oddly with that of the government in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), where the Department of Justice at the outset in the District Court filed documents purporting to expunge all records of the defamatory firing of Vitarelli as a security risk, but refused to give him back his job, because he lacked civil-service tenure, until compelled by the mandate of this Court. But in Moore the Department of Justice arranged for Moore to return to her job in the Department of State, and so informed counsel within three days of the service of the complaint upon the U.S. Attorney. But both the Departments of State and Justice refused to expunge the records of Moore being "unfit-for-duty" (psychiatric). This persistent refusal of respondents to confess error would appear to add to the toll of injury committed against Moore. The "occupational limbo" to which Moore was "unceremoniously relegated" have adversely affected her

health and that of her family and have severely affected her job opportunities. The refusal of respondents to expunge the records of the unlawful "fitness-for-duty examination (psychiatric)" constitutes a continuing violation of Moore's constitutional rights, today.

The issue of the use of psychiatry as a technique of discipline—in contrast to conventional procedures of personnel administration—is important, not just to Moore, profound as her personal consequences have been, but to other Americans working here and overseas, not to speak of the public, who are wont to think that "It Can't Happen Here!" Counsel requires the authority of the Federal Civil Rules on discovery to develop a full evidentiary record in support of the above allegations. The effect of the trial court's order of dismissal was stop all that.

(b) The Prudential Doctrine Of "Exhaustion Of Administrative Remedies" For A United States District Court Depends Upon The Actual Availability Of The Predicated Remedy; And If No Administrative Remedy Is Available According To The Official Determination Of The Administrative Tribunal, Then A Court Order Requiring Exhaustion Of A Phantom Administrative Remedy Is Erroneous. The Judgments Below Are Thus In Conflict With The 4th Circuit And The Merit Systems Board Itself.

By dismissing Moore's complaint for failure to exhaust the administrative remedies of the Merit Systems Protection Board, the District Court misconceived the jurisdiction of the Board over a due-process complaint of personnel practices unreflected in any official adverse "personnel action"—none issued in this case—and in effect directed Moore to chase phantom "administrative remedies" before the Board for two years. Meanwhile her constitutional rights were perforce in abeyance, while she continued largely in limbo at the Department of State. That resort to the Merit Systems Protection Board was

wholly a phantom remedy on the due-process complaint in this case is demonstrated on the face of the Board's opinion and order issued on June 16, 1983. The Board said:

"The presiding official's conclusion that the Board was without appellate jurisdiction over this appeal is correct. There is no law, rule, or regulation which allows the Board to review the procedures employed in a fitness-for-duty examination unless that examination is related to an otherwise appealable action. 5 U.S.C. § 7701(a). Further, neither an allegation of a prohibited personnel practice nor a violation of constitutional rights standing alone will confer jurisdiction on this Board in the absence of an otherwise appealable action. *Corbett* v. *Department of Health and Human Services*, 7 MSPB 302 (1981); *Smith* v. *Department of the Navy*, 4 MSPB 113 (1980); *Wells* v. *Harris*, 1 MSPB 199 (1980)." Printed pp. 7a at 8a.

The 4th Circuit agrees that the jurisdiction of the Merit Systems Protection Board is "narrowly defined," as it similarly held in *Williams* v. *Army*, 651 F.2d 243 (1981), which said (at p. 244):

> [2] The Board is charged with the hearing or adjudication of such matters as are placed within its jurisdiction "under any law, rule, or regulation." 5 U.S.C. §§ 7701(a) and 1205(a)(1). By law, "adverse actions" are subject to review by the Board. 5 U.S.C. § 7513(d). These actions, however, are narrowly defined and include only removal, suspension for more than 14 days, reduction in grade, reduction in pay, and furlough of 30 days or less. 5 U.S.C. § 7512(1-5). *See Delong* v. *United States*, 621 F.2d 618, 625 (4th Cir. 1980). Appellant's assertion that she was denied a promotion falls within none of these categories and is, thus, not reviewable by the Board under this authority.

Counsel for Moore unsuccessfully argued to the same effect in her motion for reconsideration to the trial court in 1981.

(c) Consent By A Federal Employee To A Psychiatric Examination Is So Important To The Life And Economic Well-Being Of The Employee That The Act Of Consent "Not Only Must Be Voluntary, But Must Be Knowing, Intelligent [And] Done With Sufficient Awareness Of The Relevant Circumstances And Likely Consequences": "The Memo Of Understanding" Does Not Meet This Court's Tests For An Effective Constitutional Waiver

The current doctrine of constitutional waiver has been summarized by Prof. Laurence H. Tribe in his *Constitutional Law* (1978) (pp. 556-57) as follows:

"Sec. 10-17. *Current Doctrine: Issues of Waiver*

> Although the Court has recognized that due process protections may be waived, it has sought to minimize the possibility of any waiver that is not knowing and voluntary by declaring that courts and other decisionmakers must "indulge every reasonable presumption against waiver." The Court has presumed that the standard for waiver in noncriminal proceedings "is the same standard applicable to waivers of constitutional rights in a criminal proceeding"—namely, that it not only must be voluntary, but must be knowing, intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences." (*Brady* v. *Maryland*, 397 U.S. 742, 748 (1970))

(d) The OPM Regulations On Psychiatry In The Federal Personnel Manual Are Binding On The Department Of State So That Substantial Departures From Those Procedures Render The Psychiatric Examination Unlawful And Taint All The Consequences Flowing Therefrom, Entitling Moore To Equitable And Compensatory Relief. The Judgments Of The Courts Below Are In Conflict With This Court's Decision In *Vitarelli* v. *Seaton*.

The Department of State has been unable to cite any specific statutory or regulatory authority to subject a non-probationary employee to a psychiatric examination, barring the possibility of a life-threatening emergency.

Substantial Failure Of The Department Of State To Follow OPM's Federal Personnel Manual On A Psychiatric Examination, printed pp. 15a-19a.

Thus, the Department of State

(a) did not "establish a prima facie case in *record* evidence that (a) the employee's service is not useful and efficient (based on performance, attendance, behavior, etc.) and (b) the apparent cause is a mental or physical illness or injury not of a transient nature. The prima facie case will document primarily deficiencies in the employee's service rather than his or her alleged illness or injury." Para (a), at p. 16a;

(b) did not make the sharp distinction between "a general physical examination or an examination by a specialist in a physical disorder: [para. 5(b), p. 17a.] and, on the other hand, a "psychiatric examination" [para. 5(c)]. In fact, the so-called "Memo of Understanding" blurred the distinction."

(c) did not observe *any* of the procedural safeguards specified in the OPM procedures in para. (5)(c), p. 17a, by not bothering

(i) to establish a panel or any kind under (c)(i);

(ii) appoint a representative of Moore [under (c)(ii) 1.];

(iii) give written notice to Moore [under (c)(ii) 2.];

(iv) afford Moore the opportunity to object to the medical examiner [under para. (c)(ii) 3 at p. 18a.];

(v) retain Moore "in active-duty status pending decision of the OPM [App., para. (6), p. 18a];

(vi) make a tentative determination and notify Moore in writing, with explanation of Moore's

> Moore in writing, with explanation of Moore's right to reply and review the case file [para (7), pp. 18a-19a].

Any comparison of the foregoing with the face of the "memo of understanding" of February 4, 1980, *supra*, p. 4, shows a world of difference. If the Department of State had substantially followed the OPM procedure in the Federal Personel Manual for the conduct of psychiatric examinations, Moore would never have gotten into her present plight. She complained in February of 1980 of the handicap of a sprained ankle and the effect of bad air in the work place. The sprained ankle would be treated, as it was, by a walking cast and time, while her consultation with family, friends and legal counsel would have laid bare the untenable basis of the Department's assertions that the bad air was unique with her and reflected the need for psychiatric help. The whole matter of diesel fumes seeping from the adjoining truck loading dock into her work space would not have been papered over, and numerous complaints over the bad air by her co-workers would have been discovered, etc., etc. This was no trifling procedural mistake by the Department of State. Standing uncorrected, it led to the free-wheeling "fitness-for-duty" examinations (psychiatric), without written procedures provided by OPM, with catastrophic effects upon Moore's life and work for years.

This Court in *Vitarelli* v. *Seaton* Held That An Executive Department Is Bound By Executive Regulations, So That Substantial Departures From The Regulation Taint Executive Action With Illegality

> "Preliminary, it should be said that departures from departmental regulations in matters of this kind involve more than mere consideration of procedural irregularities. For in proceedings of this nature, in which the ordinary rules of evidence do not apply, in

> which matters involving the disclosure of confidential information are withheld, and where it must be recognized that counsel is under practical constraints in the making of objections and in the tactical handling of his case which would not obtain in a cause being tried in a court of law before trained judges, scrupulous observance of departmental procedural safeguards is clearly of particular importance." *Vitarelli* v. *Seaton*, 3 L. Ed. 2d 1012, at p. 1017)

If this Court spoke thusly where counsel for the federal employee was present, what would it say of the Department of State meeting with Moore where she had no legal counsel, no friend of her choice, knew nothing of the Federal Personnel Manual, eagerly sought personnel counseling and got nothing?

Serious Misrepresentations By The Department Of State Invalidates The "Memo Of Understanding"

State Department concealment from Moore of the existence and provisions of OPM's Federal Personnel Manual constituted serious misrepresentations to Moore and consequently invalidated her consent to the "Memo of understanding" of February 4, 1980. This is elementary in the law of fraud. Counsel found considerable difficulty in locating the text of the Manual, which could not be found in the Federal Bar Library or the Supreme Court Library in 1980. This event has some of the shades of *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

The judgments of the courts below reflect not the slightest concern with *Vitarelli* and are thus in conflict with the decisional law of this Court.

(e) Where The Civil Service Laws Provide No Statutory Remedy To A Federal Employee For An Injury In A Constitutional Sense, A United States District Court, In The Absence Of A Contrary Congressional Directive, Has A Duty To Make The Kind Of Remedial Determination That Is Appropriate For A Common-Law Tribunal, Providing Legal And Equitable Relief. The Judgment Of The Court Below Is In Conflict With *Bush* v. *Lucas* By This Court.

This Court on June 13, 1983, in *Bush* v. *Lucas*, 103 S. Ct. 2404 (6-14-83) exhaustively reviewed the rights of federal employees to a new non-statutory remedy for constitutional violations by their superiors. The employee in that case had already appealed a demotion to the Civil Service Commission's Appeals Review Board, and had been restored to his former position retroactively and had received back pay of approximately $30,000. Not satisfied with this, he brought an action for damages for defamation and violations of his constitutional rights in the Alabama state court, removed to the federal court. The Court denied a new remedy in this case.

The following excerpts from the Bush opinion are given:

> "The federal courts' power to grant relief not expressly authorized by Congress is firmly established. Under 28 U.S.C. § 1331 (1976), the federal courts have jurisdiction to decide all cases "aris[ing] under the Constitution, laws, or treaties of the United States." [at p. 2409]
>
> "The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's

> power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation. [at p. 2411]

From the concurring opinion by Justices Marshall and Blackmun:

> "Moreover, there is nothing in today's decision to foreclose a federal employee from pursuing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme." [at p. 2418]

Thus, the decision of the District of Columbia Circuit is in conflict with *Bush* v. *Lucas*. The District Court's judgment came down in 1981, before *Bush*.

(f) A United States District Court Has Jurisdiction Over Federal Officials Specifically Named In Their Public Capacities In A Due-Process Complaint, As Herein, And Actually Served At Their Offices In The Department Of State, And Not At Their Home Residences, Where The Allegations Against Them Reflect A Reckless And Callous Indifference On Their Part To The Federally Protected Rights Of Petitioner.

The order of the trial court, pp. 3a, at p. 5a, stated that respondents Mathias and Coran "are sued in their individual capacities for denying plaintiff's constitutional rights" and that personal service must be made at their home residences. The caption of this case, as well as the description of respondents in paras. 5 and 6 of the complaint, show clearly that petitioner intended, and so stated, to sue these respondents in their public capacities, and they were actually served by the U.S. Marshall at their offices in the Department of State. Counsel has been denied their home addresses. Since all the allegations

against respondent Mathias and Coran took place at the offices of the Department of State or were described on official letters of the Department of State on the stationery of that Department, actual service at their place of work ought to suffice in a due-process claim. This Court's recent decision in *Smith* v. *Wade*, ___ U.S. ___, 103 S.Ct. 1625, 1637 (1983) may give rise to a query on older case law on the immunity of persons sued officially for the denial of constitutional rights. The test should depend upon the constitutional dimension involved and the extent of the participation of the official in "the reckless and careless indifference to the federally protected rights," which in turn rests on the fullest discovery. Here, unfortunately, discovery was cut off against Mathias and Coran before it could get stated, as shown in the next paragraph.

(g) A Federal Employee Filling A Due-Process Complaint Against Government Officials Is Entitled To The Aid Of Discovery, Like Any Other Litigant, To Develop Evidentiary Records, To Support Equitable Relief Against Present And Continuing Violations Of Constitutional Rights And To Support A Jury Trial For Damages.

The denial of all discovery as a practical concomitant of the trial court's order of dismissal on April 30, 1981, deprived petitioner of a major benefit of a litigant against the government in the Federal courts. This is particularly true in view of the complaint's due-process claims, *supra*, pp. 7-12, and 14-17. The denial of all discovery is also harmful to a litigant seeking a declaratory judgment and equitable relief to assure prompt discontinuance of respondents' constitutional violations. As already stated, the branding of petitioner continues today.

The judgments of the courts below are in conflict with this Court's decisions in *Youngstown Sheet and Tube* v.

Sawyer, 343 U.S. 579 (1952) and *Powell* v. *McCormack*, 395 U.S. 486 (1969).

CONCLUSION

For all the reasons set forth herein, Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

CLIFFORD J. HYNNING
(Counsel of Record)

2121 Massachusetts Ave. N.W.
Washington, D.C., 20008
(202) 387-7783

APPENDIX

DEPARTMENT OF STATE
Washington, D.C. 20520
December 24, 1980

Clifford Hynning, Esq.
3700 North Military Road
Arlington, Virginia 22207

Re: Janet Moore

Dear Mr. Hynning:

This letter is a follow-up to mine of October 31 and November 25, 1980, relating to discussions between you and Department of State officials relating to Miss Moore's return to active employment with the Department of State. Since my last letter, we have had several telephone conversations and I have attempted to communicate your position to officers of the Department concerned with this matter. I have at the same time attempted to elicit from them a clear assessment of the Department's position respecting the circumstances under which Miss Moore would be permitted to return to work, either on a full or part-time basis. This letter is intended to provide you with such an assessment.

It is the view of the Department's Division of Medical Services that the examinations of Miss Moore conducted by competent physicians were adequate under the circumstances. These examinations led to a recommendation that the deficiencies in service which precipitated the fitness for duty examination request were caused by a medical (psychiatric) illness. It is further the view of the Division of Medical Services that the records compiled as a result of those examinations require no amendments or deletions. For this reason, the Medical Division is not prepared to expunge any of these records.

The Medical Division is prepared to receive additional information from competent medical sources which provide a basis for assessing any change which may have taken place in Miss Moore's condition since the earlier examinations were conducted and which may result in rehabilitation to the extent of being fit for duty once again. Based upon such additional information, the Department of Medical Services would be prepared to perform another fitness-for-duty examination for Miss Moore and to amend her medical records accordingly.

I hope this information will be of assistance to you.

Sincerely,

Horace F. Shamwell, Jr.
HORACE F. SHAMWELL, JR.
Deputy Assistant Legal Advisor
for Management

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0534

JANET A. MOORE,

Plaintiff,

v.

ALEXANDER M. HAIG,
Secretary of State, *et al.*,

Defendants.

FILED
April 30, 1981
JAMES E. DAVEY,
Clerk

ORDER

Plaintiff Janet Moore alleges that she was wrongfully separated from employment as a GS-12 Computer Specialist with the Information Systems Office of the Department of State. She claims that in connection with this separation she was compelled to undergo psychiatric and other medical examinations in violation of her due process rights and applicable administrative regulations. She applied for a temporary restraining order on March 5, 1981, seeking reinstatement, back pay, expungement of medical records and attorneys fees. Following a status conference, plaintiff moved for a preliminary injunction, seeking the same relief. That motion was filed on March 13th. The plaintiff returned to work by agreement of the parties on March 23rd. The government has moved to dis-

miss the action on the ground that plaintiff has failed to exhaust her administrative remedies under the Civil Service Reform Act of 1978.[1] It has also moved for summary judgment, asserting that plaintiff was on leave without pay at her own request and that she voluntarily undertook the medical examinations at issue. The Court concludes that plaintiff should first pursue relief at the administrative level.

The Civil Service Reform Act provides for an appeal of agency action suspending an employee to the Merit Systems Protection Board (Board). 5 U.S.C. §§ 7512, 7513, 7701. Plaintiff's claim that she has been placed in "limbo" by the State Department without regard to procedural requirements imposed on the government comes within the review authority of the Board. *See Gratehouse* v. *United States*, 512 F.2d 1104, 1108 (Ct. Cl. 1975).[2] She has not sought relief or pursued any proceeding before the Board and consequently has failed to exhaust her administrative remedies. *Wallace* v. *Lynn*, 507 F.2d 1186, 1189 (D.C. Cir. 1974). Furthermore, any judicial review of the Board decision lies in the Court of Claims, 5 U.S.C. § 7703. Therefore, this Court is without jurisdiction over plaintiff's administrative claims.

The presence of her due process claim does not vitiate the exhaustion requirement. She seeks back pay expungement of records and attorneys fees for both the constitutional and administrative violations. Plaintiff makes no claim for additional relief for constitutional violations. Thus, the administrative remedy plaintiff may receive could eliminate the need to pass on the con-

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[1] 5 U.S.C. § 1101 *et seq.*

[2] Although *Gratehouse* and *Wallace*, discussed *infra*, were both decided before the Civil Service Reform Act, their principles remain applicable to federal personnel actions.

stitutional issue. Plaintiff will have full opportunity to raise her due process claim in the Court of Claims. *See* 28 U.S.C. § 1491. In this situation there is "strong reason" for requiring her to first pursue her administrative remedies. *Wallace*, 507 F.2d at 1190-1191.

Finally, the government has moved to dismiss the action against Paul Coron and Dr. Glenn Mathias for lack of personal jurisdiction. Since these defendants are sued in their individual capacities for denying plaintiff's constitutional rights, personal service must be effected on them in accordance with Rule 4(d)(1), Fed. R. Civ. P., *Relf v. Gasch*, 511 F.2d 804, 807-08 & n. 18 (D.C. Cir. 1975); 2 *Moore's Federal Practice*, ¶ 4.29 at 4-310 to 4-311 (2d ed. 1979). The records indicate, and plaintiff does not dispute, the absence of such service. Therefore, there is no jurisdiction over these defendants.

Accordingly, it is this *30th* day of April, 1981.

ORDERED that plaintiff's motion for preliminary injunction is denied; and it is

FURTHER ORDERED that defendant's motion to dismiss is granted and the case is dismissed.

Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0534

JANET A. MOORE,

Plaintiff,

v.

ALEXANDER M. HAIG,
Secretary of State, *et al.*,

Defendants.

FILED
June 3, 1981
JAMES E. DAVEY,
Clerk

ORDER

UPON CONSIDERATION OF plaintiff's motion for reconsideration, defendant's opposition thereto, and the entire record herein, it is by the Court this *3rd* day of June, 1981,

ORDERED that plaintiff's motion be and hereby is denied.

Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No. DC07528110679

JANET A. MOORE

v.

DEPARTMENT OF STATE

OPINION AND ORDER

Appellant, Janet A. Moore, filed an appeal with the Board's Washington, D.C. Regional Office alleging first, that the Department of State (agency) forced her to take a fitness-for-duty examination without following the procedures set forth at FPM Supp. 831-1, S10-10 and second, that as a consequence of the results of the fitness-for-duty examination, she was forced to take leave from her position as a Computer Specialist.

Following a three-day hearing, the presiding official issued an initial decision dismissing the appeal as not being within the Board's appellate jurisdiction. He so found because there is no independent statutory or regulatory right of appeal to the Board from an alleged improper fitness-for-duty examination and also that appellant failed to prove that she was placed on enforced leave under the test set forth in *Mosely* v. *Department of the Navy*, 4 MSPB 220 (1980).[1]

---

[1] In *Mosely*, the Bopard found that an appellant must establish the following elements in order to show that leave actually constituted a suspension:

1) The appellant as placed on leave without his or her consent;

Appellant, through her attorney, filed a timely petition for review in which she reargues the contentions raised before the presiding official. She argues that by requiring her to take a fitness-for-duty examination, the agency violated her constitutional rights and committed a prohibited personnel practice. Further, she alleges that the presiding official committed harmful error by forcing her to submit a post-hearing brief within seven days of the conclusion of the hearing even though the transcript of the hearing was not available by that date and also by refusing to allow her to present two witnesses at the hearing. As explained below, these contentions are without merit.

The presiding official's conclusion that the Board was without appellate jurisdiction over this appeal is correct. There is no law, rule, or regulation which allows the Board to review the procedures employed in a fitness-for-duty examination unless that examination is related to an otherwise appealable action. 5 U.S.C. § 7701(a). Further, neither an allegation of a prohibited personnel practice nor a violation of constitutional rights standing alone will confer jurisdiction on this Board in the absence of an otherwise appealable action. *Corbett* v. *Department of Health and Human Services*, 7 MSPB 302 (1981); *Smith* v. *Department of the Navy*, 4 MSPB 113 (1980); *Wells* v. *Harris*, 1 MSPB 199 (1980).

Appellant's next contention is that the presiding official abused his discretion in requiring her to submit a post-hearing brief prior to the receipt of the hearing transcript. The submission of post-hearing briefs is, under

---

2) The appellant as in fact ready, willing and able to work during the period of leave; and

3) The enforced leave was used in a personal disciplinary-type of situation.

both regulatory and decisional law, a matter entrusted to the presiding official's broad discretion to enable him to elicit discussion of material facts and issues in the most efficient possible manner. 5 C.F.R. § 1201.57(a); *Miller* v. *Department of the Air Force*, MSPB Docket Number BN075209070 (November 30, 1981); *see also* 5 U.S.C. § 556(c)(5). Further, the record shows that appellant was provided the opportunity and did present oral closing argument at the end of the hearing.

Appellant has failed to show any prejudicial error denigrating her substantive rights resulting from the presiding official's order requiring her to file a post-hearing brief prior to the receipt of the hearing transcript. Accordingly, no abuse of discretion has been established. *Karapinka* v. *Department of Energy*, 6 MSPB 114 (1981).

Finally, appellant contends that the presiding official erred by denying her request for two witnesses. Appellant's petition does not identify the substance of their testimony denied by the presiding official, or state how their absence impaired the proceedings or appellant's rights. The Board finds that appellant has not shown that the presiding official committed reversible error in this matter. *Christenson* v. *Department of Health and Human Services*, MSPB Docket Number DC03518110170 (April 22, 1982).

Accordingly, the petition for review is DENIED.

This is the final Order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action by filing a petition for review

in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
ROBERT E. TAYLOR
Secretary

June 16, 1981

Washington, D.C.

UNITED STATES COURT OF APPEALSFOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1743 September Term, 1983

Civil Action No. 81-00534

JANET A. MOORE,

Appellant,

v.

GEORGE P. SCHULTZ, Secretary of State of the United States, *et al.*,

FILED
April 18, 1984
GEORGE A. FISHER,
Clerk

Appeal from the United States District Court for the District of Columbia.

Before WRIGHT, SCALIA, AND FRIEDMAN,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. The issues presented have been fully considered by the court;

*Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a) (1982). ??? of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

they occasion no need for an opinion. *See* D.C. Cir. R. 13(c).

This court is in agreement with the result reached by the District Court, generally for the reasons stated in its Order filed April 30, 1981. *See* Appendix to Appellant's Brief at A3-A5.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this case is affirmed.

It is FURTHER ORDERED by this court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 14, as amended November 30, 1981 and June 15, 1982.

Per Curiam
For the Court

George A. Fisher
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 81-1743 September Term, 1983

Civil Action No. 81-00534

JANET A. MOORE,

Appellant,

v.

ALEXANDER M. HAIG, Secretary of State, of the U.S.A., *et al.*,

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BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges, and Friedman*, Circuit Judge, United States Court of Appeals for the Federal Circuit

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FILED
June 18, 1984
GEORGE A. FISHER,
Clerk

ORDER

The Suggestion for Rehearing *en banc* of Petitioner has been circulated to the full court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

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*Sitting by designation pursuant to Title 28 U.S.C. § 391(a).

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
For the Court:

George A. Fisher
GEORGE A. FISHER
Clerk

BY: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Excerpts from Office of Personnel Management, *Federal Personnel Manual, Supplement 831-1*

S10-10 FILED-BY-AGENCY DISABILITY RETIREMENT PROCEDURES

a. **Procedural responsibilities of agency when it considers acting upon deficiencies in an employee's service caused by a possible health problem.** (1) *Procedures.* An agency should follow the procedures prescribed by the regulations if the deficiencies in an employee's service, conduct, or attendance are such that removal may be necessary to promote the efficiency of the service, or if the employee's behavior or physical condition is such that it presents a significant disruptive influence or risk to the safety of others in the work environment. These procedures are of two types: Those that are *required* and those that are *recommended* as good personnel practices. The required procedures must be observed in every case. The Civil Service Commission will remand to agencies without action any agency-filed disability retirement case which indicates lack of conformance with required procedures. Failure of an agency to follow recommended procedures will not be cause for remanding or, in itself, a basis for denial of the application. An employee has the right to be represented at any time during these procedures. Hereafter in this section, the word *employee* includes the concept of representative where appropriate, and all rights, notices, etc., are available to representatives.

(2) *Making preliminary decision*

(a) The agency is required to make a preliminary determination that the employee's performance, attendance, or behavior is below the level of acceptability, and on the basis of management evidence, that a health problem exists which could account for the service deficiencies. Management evidence means information obtained from such readily available sources as

supervisory observation of job performance, absence from duty, or knowledge of illness, accident, or hospitalization.

(b) It is recommended that supervisors and personnel officials consult informally with the agency medical officer to explore possible medical solutions to the employee's problems.

(3) *Establishing a prima facie case.* The agency is required to establish a prima facie case in *record* evidence that (a) the employee's service is not useful and efficient (based on performance, attendance, behavior, etc.) and (b) the apparent cause is a mental or physical illness or injury not of a transient nature. The prima facie case will document primarily deficiencies in the employee's service rather than his or her alleged illness or injury. Except where an issue of safety of life or property or an issue of security clearance can be decided only upon the basis of the state of physical or mental health of the employee, to be sufficient, the available evidence should be such that it will warrant consideration of the employee's removal from the service under adverse action procedures if medical findings do not support disability retirement.

(4) *Conducting a counseling session*

(a) It is recommended that, if possible, the agency have a counseling session with the employee to discuss the problem and to inform the employee thoroughly of the advantages and disadvantages of the various alternatives open to him or her before any formal action is initiated. A transcript need not be made of this session. If a counseling session is not held, the reasons should be given in the record. One of the primary purposes of the counseling session is to explore with the employee the possibility of reassignment to another position. An agency should make a conscientious search and should consider the employee's potential value for retraining for a different type of work.

(5) *Obtaining medical evidence*

(b) When the agency has decided that available medical evidence is apparently inadequate, the employee's supervisor or other manager familiar with the employee's performance on the job must decide, with the assistance of any available medical advice, whether the possible health problem(s) affecting the employee's service can be evaluated by a general physical examination, an examination by a specialist in a physical disorder, or a psychiatric examination.

(c) If the employee's supervisor or other manager familiar with the employee's performance on the job decides that the behavior of the employee has been such as to raise the possibility that the illness is mental or emotional, and recommends a psychiatric examination, or if a physical examination was made and the medical examiner recommends a psychiatric examination:

(i) An employee may not be ordered to report for a psychiatric examination unless a majority of a panel of at least three agency officials agree that the circumstances warrant such action.

(ii) If a majority of the agency panel agrees that a psychiatric examination is indicated, such an examination will be ordered as follows:

1. If a psychiatric examination is to be ordered, appointment of a representative is required. An employee may name a representative at any time, but if he or she fails to name one voluntarily, the agency should urge the employee to do so before ordering a fitness-for-duty psychiatric examination and offer him or her assistance by naming the kinds of persons who make good representatives. If the employee does not name a representative at the agency's urging, the agency must appoint a representative who will receive copies of all notices, determinations, decisions, or other written communications issued to the employee under these procedures.

2. A written notice to the employee must be prepared to order the examination as above.

3. If the employee objects to the medical examiner named by the agency, he or she will be asked to submit the names of three to five board-certified psychiatrists to whom the employee would be willing to report. The agency will then select a medical examiner from the list and arrange an examination.

(6) *Duty status.* The agency is required to retain an employee in an active-duty status pending decision of the Office of Personnel Management, Compensation Group on an agency application for disability retirement, except that the agency on the basis of medical evidence may place an employee on leave with his or her consent, or without consent when the circumstances are such that retention in an active-duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, fellow workers, or the general public. If the leave account of the employee is or becomes exhausted, any suspension or involuntary leave without pay must be effected in accordance with applicable laws, Executive Orders, and regulations.

(7) *Making tentative determination.* On the basis of all available evidence, the agency is required to decide whether deficiencies in the employee's service are caused by illness or injury. If not, adverse action procedures may be instituted if warranted. If the agency decides that deficiencies in the employee's service (performance, attendance, behavior, etc.) are established and are caused by disease or injury, it then must notify the employee of this tentative determination that he or she meets all requirements to be retired for disability. The notice must:

(a) Be in writing;

(b) Give reasons for tentative determinations;[1]

(c) Include an explanation of the employee's right to reply orally, or in writing, or both, and to submit affidavits or documentary evidence or both, within a specific reasonable time, but no less than 15 calendar days; instructions for submitting a reply; and an explanation of the right to representation, if a representative has not already been designated;

(d) Advise the employee of the right (or that of his or her physician or representative, or both) to review the case file and to obtain copies of the medical findings at no expense; and

(e) Name the official designated to receive employee's oral reply.

(8) *Answering tentative determination.* If the employee answers the agency notice of tentative determination, all documentary evidence (i.e., medical reports, hospital records; affidavits, or statements) offered by the employee or his or her representative must be received, considered, and included in the case file. An oral reply to the previously designated agency official must be summarized in writing and included in the case file. An addition copy, approved or supplemented by the employee, must be included in the case file. The employee may amend his or her copy of the summary or submit correction or supplementation within five calendar days. The designated agency official may make or recommend the decision.